

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STACIA ALLEN,)	NO. 62338-9-I
)	
Appellant,)	DIVISION ONE
)	
v.)	
)	
GLOBAL ADVISORY GROUP, INC.,)	Unpublished Opinion
a Washington corporation, d/b/a/)	
MORTGAGE ADVISORY GROUP,)	FILED: May 26, 2009
a Washington business entity,)	
)	
<u>Respondent.</u>)	

Lau, J. — Stacia Allen, an employee of Global Advisory Group Inc., reported an incident of sexual harassment by coworker Warren Craig. In response, Global allowed Craig to remain in the office and gave Allen the option of working from home. But following a panic attack on seeing Craig at the office, Allen quit her job and filed suit against Global. Allen now appeals the summary judgment dismissal of her hostile work environment, constructive discharge, and retaliation claims. She contends that there are genuine issues of material fact regarding whether (1) the offensive sexual conduct unreasonably affected the terms and conditions of her employment, (2) the harassment was imputable to Global, (3) Global's deliberate actions created an intolerable working

environment that compelled her to resign, and (4) Global took adverse retaliatory action in response to her harassment claim. Because there are genuine issues of material fact relating to her hostile work environment and constructive discharge claims, we reverse and remand these claims for trial. But we affirm summary judgment dismissal of her retaliation claim because no fact issues exist.

FACTS

Stacia Allen began working as a mortgage advisor at Global's Everett office on June 18, 2007. Warren Craig, another mortgage advisor, worked in the same office. During her first few weeks of work, Craig twice approached Allen and massaged her neck and shoulders as she sat at her desk. Allen admitted that this conduct was not unwelcome and that she did not feel threatened.

But Craig's behavior subsequently escalated into an incident of unwanted physical contact. At around noon on July 24, 2007, Allen told Craig "I don't feel good, I think I should go get a back massage." As she stood up to leave, Craig approached her from behind and started rubbing her shoulders. At first, Allen "just stood there." But according to Allen, "within two seconds" Craig pressed his penis against her lower back and buttocks and told her that he was "becoming sexually aroused." Allen tried to stop him by moving away, but he moved closer, put his head in her hair, and said, "I am getting more pleasure out of this than you are." Allen panicked and froze up. She tried to catch the attention of coworker Deanna Howell by saying, "See what you get when you move into this office," but Howell "did not understand her predicament" and walked away.

After Howell left the room, Allen said that Craig whispered, “[W]hy are we even trying to talk to her?” Allen wanted to get out of the situation, but did not know how. Allen said the incident ended when Craig’s phone rang. He said, “I’m going to get that,” smacked her on the buttocks, and said, “I’ll be right back.” Allen immediately left the building, got into her car, and drove away.

Allen called her coworker Lisa Kee and told her what had happened. Kee reported the incident to office manager Jeryl Torick. Kee subsequently provided Torick with a written statement recounting Allen’s description of the incident. Kee wrote that Allen, angry and crying, described the attack and said, “I can’t ever go back there. That is so f----- gross!” Kee told Allen that she needed to report the incident herself, but Allen said she felt too humiliated. Kee told Allen that if she did not report the incident, then Kee would. Allen told Kee that she “never wanted to be the reason anyone got fired.” Kee assured Allen that the incident was not Allen’s fault and that Allen had nothing to be embarrassed about.

Torick called Allen at home. Allen was crying and said she felt dirty and humiliated, but said she did not want to be responsible for getting anyone fired. Allen also said she did not want to come into the office again and did not want to see Warren ever again. Torick “assured her that if she needed or wanted to come to the office that she could call me anytime and I would assure her the coast was clear and she would be protected from Warren.”

Global immediately interviewed Craig, put him on nondisciplinary administrative leave pending investigation of the incident, and directed him to provide a written

statement. When Craig learned of the allegations, he put his head in his hands and said, "Is this about my slapping her on the backside?" Craig admitted that when he was massaging Allen's shoulders he "got carried away." He also acknowledged saying, "I'm probably getting more out of this than you are." But when asked if he pushed himself up against her, he said, "Oh no, I don't think so."

The day after the incident, Global chief executive officer Lori Morris sent Allen a written acknowledgement of her claim and directed her to provide a written statement. Morris's letter stated that the parties involved, including Allen, were being placed on administrative leave "to provide a safe and harassment free work environment while collecting and review[ing] information regarding the incident." Morris encouraged Allen to continue to work from home during the investigation.

After the investigation, Global concluded that Craig's actions violated its sexual harassment policy. On August 1, 2007, Global issued a written resolution plan outlined in a "Letter of Resolve." The plan included the following elements: (1) revision of the harassment policy to include detail on proper methods of reporting and eliminating harassment in the workplace; (2) reissue of the harassment policy to all employees; (3) regular mandatory harassment training for all employees; (4) severe disciplinary write up in Craig's file, including a clause for immediate termination upon any further substantiated incidents; (5) continued monitoring of behavior; (6) revised seating arrangements to address a physical separation in work space between Allen and Craig; (7) no further personal interaction between Allen and Craig; and (8) an offer to relocate Allen to the planned new Smokey Point Branch upon opening.¹

Global held a meeting to discuss the letter of resolve with Allen. They discussed three options for Allen—work from home, work from home until the Smokey Point branch opened, or return to work in the Everett office with Craig relocated to a different floor in the same building. At the meeting, Allen signed the letter of resolve. She then continued to work from home.

But later, in a deposition taken after the lawsuit was filed, Allen expressed her dissatisfaction with the three options. She felt that Global's offer to move her to a different location was unfair and amounted to punishing the victim. She felt that Craig should have been given the option to transfer or be terminated. She did not suggest other alternatives with Global because "that's not my place to do so. I shouldn't have to find the solution for something."

Morris later stated, "We did not offer Warren Craig any options because we did not want to be viewed as rewarding his behavior." Morris also stated that they had considered firing Craig but decided not to because (1) Allen indicated that she did not want him terminated, (2) this was the only instance of misconduct at Global involving Craig, (3) the sole witness characterized the incident differently than Allen, (4) the prior consensual massages probably contributed to the offensive conduct, and (5) they believed that with appropriate corrective action, no further incidents would occur.

Torick called Allen at home almost daily to check in and ask how Global could support her. Torick told Allen to call anytime she wanted to return to the office and

¹ Global eventually decided to postpone indefinitely opening a new branch at Smokey Point due to the economic downturn.

personally guaranteed that Craig would not harass her. Torick said the goal was to make Allen feel comfortable enough to return to the office. Allen recalls telling Torick that she was having a hard time working from home because of the distractions and that "I cannot work in the same environment as Warren Craig."

On August 14, 2007, Global held a mandatory sexual harassment training seminar at the Everett office. Two sessions were offered on different days. Because Torick wanted to ensure that Craig and Allen did not attend the same session, she asked Allen to choose which day she wanted to participate. Allen agreed to attend. But on the day of the seminar, Allen looked out the upstairs window and saw Craig standing at a downstairs window looking up at her. Allen said that "extreme panic went through my body," and at that moment, "I knew that I no longer could work for the company."

Approximately two days later, Global received notice from the Department of Employment Security that Allen had filed an unemployment benefit claim. On August 22, 2007, Allen submitted a resignation letter to Global. The letter stated that Allen felt she was "working in a hostile environment" and she would "not be able to do [her] job efficiently due to the stress [she was] under from everything that has occurred. Starting with the harassment and then the way [she] was treated after."

Allen filed suit against Global, alleging hostile work environment, constructive discharge, retaliation, breach of contract, violation of public policy, infliction of emotional distress, outrage, negligent supervision and training, and respondeat superior. The trial court granted Global's summary judgment motion and dismissed all

of Allen's claims. Allen appealed the dismissal of her hostile work environment, constructive discharge, and retaliation claims.

ANALYSIS

The appellate court reviews a summary judgment order de novo. Owen v. Burlington N. & Santa Fe R.R., 153 Wn.2d 780, 787, 108 P.3d 1220 (2005). Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Kirby v. City of Tacoma, 124 Wn. App. 454, 464, 98 P.3d 827 (2004). All facts and reasonable inferences must be viewed in the light most favorable to the nonmoving party. Qwest Corp. v. City of Bellevue, 161 Wn.2d 353, 358, 166 P.3d 667 (2007). "If there is a dispute as to any material fact, then summary judgment was improper. However, if reasonable minds could reach but one conclusion from the admissible facts in evidence, summary judgment is proper." Haubry v. Snow, 106 Wn. App. 666, 670, 31 P.3d 1186 (2001). "In order for a plaintiff alleging discrimination in the workplace to overcome a motion for summary judgment, he or she must do more than express an opinion or make conclusory statements. The plaintiff must establish specific and material facts to support each element of his or her prima facie case." Haubry, 106 Wn. App. at 670. "Summary judgment should rarely be granted in employment discrimination cases." Sangster v. Albertson's, Inc., 99 Wn. App. 156, 160, 991 P.2d 674 (2000).

Hostile Work Environment

Allen argues that the trial court erred in dismissing her hostile work environment claim under the Washington Law Against Discrimination (WLAD), chapter 49.60 RCW.²

RCW 49.60.180(3) provides,

It is an unfair practice for any employer . . . [t]o discriminate against any person in compensation or in other terms or conditions of employment because of age, sex, marital status, sexual orientation, race, creed, color, national origin, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability

The provisions of chapter 49.60 RCW “shall be construed liberally for the accomplishment of the purposes thereof.” RCW 49.60.020.

“To establish a hostile work environment sexual harassment case under chapter 49.60 RCW, [the plaintiff] must prove: (1) the harassment was unwelcome; (2) the harassment was because of sex; (3) the harassment ‘affected the terms or conditions of employment,’ and (4) the harassment is imputed to the employer.” Estevez v. Faculty Club of Univ. of Wash., 129 Wn. App. 774, 794, 120 P.3d 579 (2005) (quoting Coville v. Cobarc Servs., Inc., 73 Wn. App. 433, 438, 869 P.2d 1103 (1994)). Global concedes that the first two elements were met—the harassment was unwelcome to Allen and was because of sex. But Global contends that Allen’s claims fail because the incident did not affect the terms and conditions of her employment and because the harassment cannot be imputed to Global.

Terms and Conditions of Employment. To meet the third hostile work environment element, the employee must establish that the harassment was “sufficiently pervasive so as to alter the conditions of employment and create an

² “Because chapter 49.60 RCW substantially parallels Title VII, federal cases interpreting Title VII are ‘persuasive authority for the construction of RCW 49.60.’” Estevez at 793 (quoting Oliver v. Pac. Nw. Bell Tel. Co., 106 Wn.2d 675, 678, 724 P.2d 1003 (1986)). But the scope of Title VII is not as broad as RCW 49.60, as Title VII does not contain a direction for liberal interpretation as WLAD does. Martini v. Boeing Co., 137 Wn.2d 357, 372–73, 971 P.2d 45 (1999).

abusive working environment.” Glasgow v. Georgia-Pacific Corp., 103 Wn.2d 401, 406, 693 P.2d 708 (1985). Courts consider the “frequency of the discriminatory conduct; its severity; whether it is physically threatening and humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.” Sangster, 99 Wn. App. at 163 (quoting Harris v. Forklift Sys. Inc., 510 U.S. 17, 23, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993)). “The required showing of severity or seriousness of the harassing conduct varies inversely with the pervasiveness or frequency of the conduct.” Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991). “Casual, isolated or trivial manifestations of a discriminatory environment do not affect the terms and conditions of employment to a sufficiently significant degree to violate the law.” Glasgow, 103 Wn.2d at 406. “Although a single act can be enough, generally, repeated incidents create a stronger claim of hostile environment, with the strength of the claim depending on the number of incidents and the intensity of each incident.” King v. Bd. of Regents of Univ. of Wisconsin Sys., 898 F.2d 533, 537 (7th Cir. 1990) (citation omitted). Whether the harassment creates an abusive working environment is determined by examining the totality of the circumstances. Sangster, 99 Wn. App. at 163. And “[s]ummary judgment in favor of the employer in a discrimination case is often inappropriate because the evidence will generally contain reasonable but competing inferences of both discrimination and nondiscrimination that must be resolved by a jury.” Davis v. West One Auto. Group, 140 Wn. App. 449, 456, 166 P.3d 807 (2007), review denied, 163 Wn.2d 1040 (2008).

Allen argues that Craig’s conduct altered the terms and conditions of her

employment because it was physical, severe, threatening, humiliating, degrading, and caused continuing fear for her safety. She contends that Craig committed multiple acts of harassment because, in retrospect, the first two back rubs were sexually motivated. She further contends that Global altered the terms and conditions of employment by forcing her to choose between three unacceptable options—working from home, working on a different floor of the same building as Craig, or waiting to be transferred to a branch office that never actually opened.

We conclude that there are questions of material fact and competing inferences regarding whether Craig's continuing presence at the Everett office rendered the harassment sufficiently severe or pervasive to create an abusive work environment. Viewing the facts in the light most favorable to Allen, Craig's conduct involved physical sexual contact as well as verbal sexual innuendo.³ Global contends that the terms and conditions of Allen's employment could not have been affected because she never returned to work at the Everett office after the single harassment incident. But Allen contends that she did not want to return to the Everett office because she feared encountering Craig. Moreover, Global did require her to come to the Everett office to attend a sexual harassment seminar, where the sight of Craig triggered a panic attack.

Global, relying primarily on MacDonald v. Korum Ford, 80 Wn. App. 877, 912 P.2d 1052 (1996), maintains that Allen failed to provide evidence that the harassment was sufficiently pervasive to affect the terms and conditions of her employment. That

³ Global does not dispute that Craig gave Allen several neck and shoulder massages and slapped her buttocks. Craig, however, denied pressing his penis against Allen.

case is distinguishable. In affirming summary judgment dismissal, the MacDonald court explained that the plaintiff “did not testify that [the harasser’s] actions were physically threatening or humiliating or that they unreasonably interfered with her work performance.” MacDonald, 80 Wn. App. at 887. In contrast, Allen testified that Craig’s behavior was physical, humiliating, and panic inducing. Courts have reversed summary judgment dismissal of sexually hostile work environment claims on facts similar to those presented by Allen. See, e.g., Sangster (demeaning and sexually suggestive comments, but no touching), Perry (inappropriate comments, gestures, and threats), Ellison (unwanted sexual advances).

Imputing Liability to the Employer. The fourth hostile work environment element—imputing liability to the employer—requires the employee to show:

“(a) that complaints were made to the employer through higher managerial or supervisory personnel or by proving such a pervasiveness of sexual harassment at the work place as to create an inference of the employer’s knowledge or constructive knowledge of it and (b) that the employer’s remedial action was not of such nature as to have been reasonably calculated to end the harassment.”

Perry v. Costco Wholesale, Inc., 123 Wn. App. 783, 791–92, 98 P.3d 1264 (2004)

(quoting Glasgow, 103 Wn.2d at 407.) “[T]he basic question is not whether an investigation is either prompt or adequate. Rather, the question is whether the remedial action by the employer is effective.” Perry, 123 Wn. App. at 795.

Allen argues that Global failed to take effective remedial action because it presented her with grossly insufficient remedial options. She contends that Global knew that Craig’s mere presence created a hostile work environment; therefore, it should have transferred Craig out of the Everett office or fired him. Global argues that

its remedial action was adequate because (1) it disciplined Craig and educated the entire office regarding sexual harassment prevention, (2) no further harassment occurred, and (3) Allen refused to return to the Everett office.

We conclude that there are questions of material fact regarding whether Craig's harassment can be imputed to Global. Viewing the evidence in a light most favorable to Allen, there are disputed facts and competing inferences on the effectiveness of Global's remedial efforts. Global claims it adequately remedied the harassment. But Allen responds that Global's remedial action left her with two undesirable choices—working in the same building as Craig or working indefinitely from home. “A victim of sexual harassment should not have to work in a less desirable location as a result of an employer's remedy for sexual harassment.” Ellison, 924 F.2d at 882. And Allen did return to the Everett office once, where she saw Craig and immediately suffered a panic attack. “If harassers are not removed from the workplace when their mere presence creates a hostile environment, employers have not fully remedied the harassment.” Ellison, 924 F.2d at 883, n.19.

Constructive Discharge

Allen contends that the trial court erred in dismissing her constructive discharge claim on summary judgment. “To establish constructive discharge, the employee must show: (1) a deliberate act by the employer that made [her] working conditions so intolerable that a reasonable person would have felt compelled to resign; and (2) that . . . she resigned because of the conditions and not for some other reason.”

Washington v. Boeing, 105 Wn. App. 1, 15, 19 P.3d 1041 (2000) (footnote omitted).

“It is the act, not the result, that must be deliberate.” Nielson v. AgriNorthwest, 95 Wn. App. 571, 578, 977 P.2d 613 (1999). The “intolerable” element can be shown by aggravated circumstances or a continuing pattern of discriminatory conduct. Sneed v. Barna, 80 Wn. App. 843, 850, 912 P.2d 1035 (1996). “The question of whether the working conditions were intolerable is one for the trier of fact, unless there is no competent evidence to establish a claim of constructive discharge.” Haubry, 106 Wn. App. at 677. “A resignation is presumed to be voluntary, and the employee must introduce evidence to rebut that presumption.” Washington, 105 Wn. App. at 16.

Allen also argues that Global’s unreasonable options, combined with Craig’s continuing presence at the Everett office, made her working conditions intolerable and compelled her to resign. Global responds that Allen’s constructive discharge claim fails as a matter of law because this was a single, isolated incident of harassment, not an ongoing pattern of discriminatory treatment. Global further argues that Allen did not quit because the corrective measures failed; rather, she did not give them a good faith opportunity to succeed.

We conclude that Allen presented sufficient evidence of constructive discharge to overcome summary judgment dismissal. Global chose to permit Craig to remain at the Everett office while leaving Allen with the choice of tolerating his presence in the building or working from home. The record shows that Allen conveyed her dissatisfaction to Global by telling them that she was having difficulty working from home and that she could not work in the same environment as Craig. Allen suffered a panic attack on seeing Craig in the Everett office. And the following week, she

informed Global that she was resigning because she felt that she was working in a hostile environment. Whether a reasonable person in her position would be forced to quit is a question of fact for the jury. See, e.g., Haubry, 106 Wn. App. at 677–78 (sexual comments and physical contact); Blomster v. Nordstrom, 103 Wn. App. 252, 258-59 11 P.3d 883 (2000) (demotion).

Retaliation

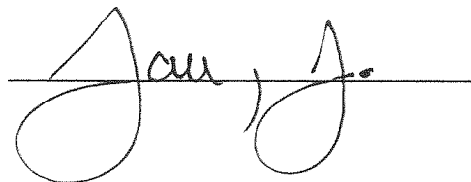
Under RCW 49.60.210(1), it is an unfair practice for any employer “to discharge, expel, or otherwise discriminate against any person because he or she . . . has filed a charge, testified, or assisted in any proceeding under this chapter.” To establish a prima facie case for retaliation, “an employee must show that (1) he or she engaged in statutorily protected activity, (2) an adverse employment action was taken, and (3) there is a causal link between the employee’s activity and the employer’s adverse action.” Estevez, 129 Wn. App. at 797. “The plaintiff need not show that retaliation was the only or ‘but for’ cause for the adverse employment action, but he or she must establish that it was at least a substantial factor.” Francom v. Costco Wholesale Corp., 98 Wn. App. 845, 862, 991 P.3d 1182 (2000). If the employee demonstrates a prima facie case, the evidentiary burden shifts to the employer to show a nonretaliatory reason for its actions. The employee must then present evidence that the reason is pretextual. Milligan v. Thompson, 110 Wn. App. 628, 638, 42 P.3d 418 (2002).

Allen argues that the trial court erred in dismissing her retaliation claim on summary judgment. She contends that Global took an adverse employment action against her when it forced her to choose from a short list of unacceptable options rather

than taking adequate remedial action that would allow her to return to the workplace following Craig's attack. She further contends that Global punished her by relegating her to work from home, without her mentor and without the equipment she needed to do her job. Global does not concede that it took any adverse employment action against Allen. It argues that allowing Allen the temporary option of working from home was at most a mere inconvenience that assured her a harassment-free work environment until a permanent solution was found. It further contends that Allen failed to meet her burden of creating a material issue of fact on whether its legitimate business reasons for the corrective action plan were a pretext for retaliation.

Even if we assume without deciding that Allen has established a prima facie case of retaliation, we conclude that the trial court properly dismissed Allen's retaliation claim. Our review of the record shows that Global presented evidence of nonretaliatory reasons for its actions and decisions in response to Allen's harassment complaint. The burden thus shifts to Allen to present evidence that Global's reasons were pretextual. We agree with Global that Allen did not present any facts demonstrating the existence of a genuine material issue of fact regarding whether Global's reasons for its actions were a pretext for retaliation. Thus, Allen's retaliation claim fails.

In sum, we affirm the trial court's summary judgment dismissal of Allen's retaliation claim. And we reverse and remand her hostile work environment and constructive discharge claims for trial.

A handwritten signature in black ink, appearing to read "Judge J. J. Jones", written over a horizontal line.

WE CONCUR:

Schindler, CT

Grosse, J